Supreme Court, U.S.
FILED
NOV 23 2015
OFFICE OF THE CLERK

No. 14–1280

**In the Supreme Court of the United States**

JEFFREY J. HEFFERNAN,
Petitioner,

v.

CITY OF PATERSON, NEW JERSEY, ET AL.
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

# *AMICI CURIAE* BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF PETITIONER

CLAY CALVERT
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
Gainesville, FL 32611

ROBERT D. RICHARDS
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802

J. JOSHUA WHEELER
*Counsel of Record*
CLAYTON N. HANSEN
Thomas Jefferson Center
for the Protection of
Free Expression
400 Worrell Drive
Charlottesville, VA 22911
(434) 295–4784
jjw@tjcenter.org

## TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. Nonpolitical Government Employees Have a First Amendment Right Not to Suffer Politically Motivated Adverse Employment Consequences ..... 3

II. Heffernan Suffered the Precise Type of Harm that § 1983 First Amendment Retaliation Claims are Designed to Remedy, Caused by the Precise Type of Politically Motivated Employment Action that § 1983 Seeks to Deter ..... 5

III. The Consequences of the Third Circuit's Rule Are Arbitrary Undercompensation of Victims, Underdeterrence of Abuses and the Chilling of Protected First Amendment Activities ..... 7

IV. Recognizing Appellee's Cause of Action Will Vindicate Important Constitutional Rights without Adding any Uncertainty to the Law ..... 10

CONCLUSION ..... 14

## TABLE OF AUTHORITIES


CASES — PAGE

*Anderson v. Creighton*, 483 U.S. 635 (1987) ..... 11

*Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) ..... 3

*Branti v. Finkel*, 445 U.S. 507 (1980) ..... 4

*Carey v. Piphus*, 435 U.S. 247 (1978) ..... 5

*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) ..... 5

*Connick v. Myers*, 461 U.S. 138 (1983) ..... 4

*Dye v. Office of the Racing Comm'n*, 702 F.3d 286 (6th Cir. 2012) ..... 8, 9, 12

*Elrod v. Burns*, 427 U.S. 347 (1976) ..... 10

*Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008) ..... 6

*Garcetti v. Ceballos*, 547 U.S. 410 (2006) ..... 4

*Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655 (3d Cir. 2002) ..... 11

*Hunt v. City of Orange*, 672 F.3d 606 (9th Cir. 2012) ..... 11

*Moss v. Martin*, 614 F.3d 707 (7th Cir. 2010) ..... 11

*NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958) ..... 3

*O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) ..... 4, 11

*Owen v. City of Independence Mo.*, 445 U.S. 622 (1980) ..... 5

*Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) .. 5

*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) ..... 9

*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) ..... 4, 6, 9, 10

*Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145 (1st Cir. 2006 ..... 11

*Wyatt v. Cole*, 504 U.S. 158 (1992) ..... 5

## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amici curiae* briefs in this and other federal courts, and in state courts around the country.

The Marion B. Brechner First Amendment Project is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by Prof. Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current cases and controversies affecting freedom of speech, freedom of press, freedom of petition, and freedom of thought.

The Pennsylvania Center for the First Amendment is a leading national research center about the First Amendment housed in the College of Communications at Penn State. For more than 20 years, the Pennsylvania Center for the First Amendment has

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici Curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *Amici* and their counsel made a monetary contribution to fund the brief's preparation or submission. Written consent of the parties have been filed with the Clerk of this Court.

been a leader in education, research and outreach concerning the fundamental rights of free expression and free press in the United States. Founded in 1992, the Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

## SUMMARY OF ARGUMENT

Three aspects of this case are undisputed. First, as a police officer, Petitioner Jeffrey Heffernan was a government employee for whom political affiliation was not an appropriate requirement for the effective performance of his public duties. Second, the First Amendment prohibits government employers from taking adverse employment actions against such non-political employees that are motivated by political or partisan affiliation or association. Third, Respondents' demotion of Heffernan was motivated solely by their belief that Heffernan supported a political candidate who was running against the incumbent mayor. Accordingly, Respondents violated Heffernan's First Amendment right of association under color of state law and 42 U.S.C. § 1983 gives him a cause of action to seek relief for the injuries caused by that violation. The Third Circuit's holding that he does not have a claim because his employer's unconstitutional action was taken based on a mistaken assumption is unduly restrictive of the First Amendment associa-

tional rights of public employees and will lead to arbitrary undercompensation of victims, underdeterrence of constitutional violations and chilling of protected First Amendment activity.

## ARGUMENT

### I. Nonpolitical Government Employees Have a First Amendment Right Not to Suffer Politically Motivated Adverse Employment Consequences

It is a cornerstone of this Court's First Amendment jurisprudence that protection of the freedom of speech necessarily encompasses the protection of "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (internal quotation marks omitted); *see also NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

The Court has also recognized that the millions of men and women who work at all levels of government do not sign away their First Amendment right

to free association when they become public employees. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("[A] citizen who works for the government is nonetheless a citizen."); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights."); *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.").

While the government may have a legitimate interest in the political affiliation of certain employees with policy-making responsibilities, for government employees such as police officers, firefighters and teachers, political affiliation is not "an appropriate requirement for the effective performance of the public office involved." *See Branti v. Finkel*, 445 U.S. 507, 517 (1980). The First Amendment gives such employees the right to support whichever candidates and parties they choose without the fear of being fired or demoted because of the political motivations of their superiors. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990) ("[P]romotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees."). This important First Amendment principle protects nonpolitical employees from suffering adverse employment consequences on account of their political beliefs and prevents govern-

ment employers from "wielding [their] powers to interfere with [their] employees' freedom to believe and associate, or to not believe and not associate." *See id.* at 76.

## II. Heffernan Suffered the Precise Type of Harm that § 1983 First Amendment Retaliation Claims are Designed to Remedy, Caused by the Precise Type of Politically Motivated Employment Action that § 1983 Seeks to Deter

This Court has long recognized that the dual purposes of 42 U.S.C. § 1983 are to compensate persons for injuries caused by constitutional violations committed under color of state law and to deter future abuses of power. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("the purpose of § 1983 is to deter state actors from using their badge of authority to deprive individuals of their federally guaranteed rights and to provide compensation if such deterrence fails."); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("To deny compensation to the victim would therefore be contrary to the purpose of § 1983."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) ("the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983."); *Owen v. City of Independence Mo.*, 445 U.S. 622, 651 (1980) ("§ 1983 was intended not only to provide compensation to the victims of past abuses, but

to serve as a deterrent against future constitutional deprivations, as well.").

As a Paterson City police officer, Heffernan had a First Amendment right not to be demoted because of the political or partisan motivations of his superiors. *See Branti*, 445 U.S. at 519 ("[C]ontinued [government employment] cannot properly be conditioned upon his allegiance to the political party in control of the . . . government."). Respondents nonetheless summarily demoted him from detective to a walking position because they believed that he supported a candidate seeking to unseat the incumbent mayor in an upcoming election. The fact that Respondents' beliefs about Heffernan's political associations may have ultimately been incorrect does not change the nature of the factual and legal harm that Heffernan suffered. As such, Heffernan should be allowed to proceed with his § 1983 claim, based not on the soundness of his employers' factual assumption, but on their motivation alone. *See Rutan* 497 U.S. at 75; *Gann v. Cline*, 519 F.3d 1090, 1094 (10th Cir. 2008) ("[O]ur only relevant consideration is the *impetus* for the elected official's employment decision vis-a-vis the plaintiff.") (emphasis added).

A government employer who fires or demotes a nonpolitical employee on the basis of a perceived political affiliation acts contrary to the First Amendment whether that perception is correct or not. For example, an employer who has reason to believe that her employee supports a political adversary might be

tempted to retaliate. The employer could do so swiftly without learning more facts or making a concerted effort to be 100 percent sure that the employee is playing for the opposing team. The Third Circuit's rule ignores the common underlying motivation of these two employers, shielding the former from liability under § 1983 so long as her hasty assumptions prove to be incorrect. This runs contrary to the spirit of First Amendment retaliation claims, which seek to deter government officers from indulging in the temptation to let political motivations affect employment decisions.

The First Amendment protects Heffernan's right not to have the course of his career as a police officer determined by the political motivations of his supervisors. *See Branti*, 445 U.S. at 519. Third Circuit precedent cannot change the fact that Heffernan has suffered the exact kind of harm caused by the exact kind of unconstitutional action by the exact kind of defendants that § 1983 exists to address.

## III. The Third Circuit's Rule Will Lead to Arbitrary Undercompensation of Victims, Underdeterrence of Abuses and the Chilling of Protected First Amendment Activities

The Third Circuit's refusal to accept perceived association as a cognizable basis of a § 1983 retaliation claim arbitrarily leaves victims undercompensated and government employers underdeterred. The Sixth

Circuit's approach, however, avoids these undesirable consequences by making "the critical inquiry" of such cases "the motivation of the employer." *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 299 (6th Cir. 2012). The district court in this case, even as it rejected Heffernan's claim, acknowledged the tenuous reasoning underpinning the Third Circuit's precedents:

> There is a certain logic to *Dye*. Assume that State Employer A retaliates because Employee is a Democrat, or a Republican. Obviously there is a First Amendment freedom of association claim to be made. If State Employer B does the same thing, with the same unconstitutional retaliatory motive, *and is wrong to boot*, should it really be placed in a *more* favorable position?

Pet. App. 51a-52a. (emphasis in original). The district court correctly recognized that the Third Circuit's approach artificially insulates Employer B from liability even though her actions were no less unconstitutional than those of Employer A. Just as importantly, the victim of B's retaliation has suffered the same harm as the victim of A's retaliation, yet one can recover while the other cannot.

Similarly, one could easily imagine a county clerk, hostile to the political movement supporting gay rights, who sees two office employees on a street

where a LGBT Pride parade is going by. The clerk assumes both employees are affiliated with Pride and fires them for that reason. It turns out that while Employee X is indeed a supporter of Pride, Employee Y just happened to be walking down the street, unaware that a parade was happening that day. The Third Circuit's rule would allow X but not Y to bring a First Amendment retaliation claim even though they were both fired for the same unconstitutional reason. This rule makes no logical sense. Section 1983 First Amendment retaliation claims should focus on the employer's motivations for employment decisions and provide a remedy for employees fired or demoted for impermissible reasons. *See Dye*, 702 F.3d at 299.

One of the key reasons for protecting freedom of association is "preserving political and cultural diversity and . . . shielding dissident expression from suppression by the majority." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). In extending First Amendment protections to government employees, this Court sought to prevent the government from doing indirectly what it could not do directly. *See Rutan*, 497 U.S. at 77–78; *Branti*, 445 U.S. 515–16. If public employees know that they can be dismissed or demoted without recourse under § 1983 when their employer makes a factually mistaken assumption about their political beliefs and activities, their natural tendency will be to refrain from engaging in protected expressive activity that might potentially give rise to erroneous assumptions about which parties, candidates, or

issues they support. Employees will also face increased pressure to support the positions held by those in power. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion) ("The threat of dismissal for failure to provide support [for the favored political party] unquestionably inhibits protected belief and association.").

Public employees have no control over whether their employers form mistaken perceptions about the employees' political affiliations. Courts must therefore focus on the motivation of the employer in these types of cases in order to protect the right of nonpolitical government employees to do their jobs free of politically motivated retaliation.

## IV. Recognizing Appellee's Cause of Action Will Vindicate Important Constitutional Rights without Adding any Uncertainty to the Law

It is clearly established that politically motivated firings and demotions of nonpolitical employees violate the First Amendment. *See Elrod*, 427 U.S. at 372-73 (plurality opinion) (holding that the First Amendment prohibits a county sheriff from firing office employees because they were not Democrats); *Branti*, 445 U.S. at 519 (holding that a public defender could not fire assistant public defenders because they were Republicans); *Rutan*, 497 U.S. at 75 (extending

the prohibition on politically-based employment decisions to promotions, transfers and layoff recalls of nonpolitical employees); *O'Hare Truck*, 518 U.S. at 717 ("Government officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.").

Furthermore, the circuit courts of appeal all recognize that § 1983 gives rise to First Amendment retaliation claims against government officers who engage in such decisions. *See, e.g.*, *Hunt v. City of Orange*, 672 F.3d 606, 611 (9th Cir. 2012); *Moss v. Martin*, 614 F.3d 707, 710 (7th Cir. 2010); *Velez-Rivera v. Agosto-Alicea*, 437 F.3d 145, 152 (1st Cir. 2006); *Goodman v. Pennsylvania Tpk. Comm'n*, 293 F.3d 655, 663-64 (3d Cir. 2002). Accordingly, government officers already know what they are not supposed to do when making employment decisions regarding nonpolitical employees.[2] Holding all public employers, including those who act on factually incorrect perceptions, accountable for politically-based firings and demotions will achieve optimal compensation and deterrence without any new uncertainty or complications in the law.

---

[2] It is illustrative of this point that in this case Respondents never attempted to assert a defense of qualified immunity because it was clearly established law that they could not have demoted Heffernan in retaliation for supporting Spagnola if they had been right in assuming that Heffernan was in fact supporting Spagnola. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Third Circuit acknowledged that Heffernan clearly established two elements of a First Amendment retaliation claim: that he was a nonpolitical appointee under the standard established in *Branti* and that his political affiliation was a substantial or motivating factor in the adverse employment decision. *See* Pet. App. at 10a. In many cases where an employee alleges that she was fired or demoted for an improper reason, the likely first response of the employer will be to point to legitimate reasons for the action. The employee always bears the burden of making a *prima facie* showing of improper motive. While there also may be a dispute about the first element, there is also a substantial class of employees who are clearly nonpolitical, such as police officers, firefighters, school teachers and lower-level clerical staff. The employee/plaintiff still bears the burden of proving these elements. What the employee should not have to prove is whether her employer was factually right or wrong about the employee's political activities, because the First Amendment compels courts to focus on the reason for the employment decision, not the soundness or accuracy of the reasoning.[3] *Dye*, 702 F.3d at 299–300.

---

[3] *Amici* recognize that the question of whether the Third Circuit erred as a matter of law when it found that there was no dispute of material fact as to whether Heffernan actually associated with Spagnola is not before the Court. *See* Pet. App. at 10a–11a. However, if this Court recognizes, as the Sixth Circuit has, that a nonpolitical government employee states a First Amendment retaliation claim when she establishes that her employer's perception of her political affiliation was a substantial or motivating factor in her adverse employment action, the soundness of such claims will no longer depend on complicated factual inquiries of

The § 1983 claim of a nonpolitical government employee who is fired or demoted for an unconstitutional reason should not depend on whether her employer made sure of the employee's political leanings before he acted unconstitutionally.

The Third and Sixth Circuits have reached opposite conclusions about whether nonpolitical public employees who suffer politically motivated firings and demotions lose their standing to bring a § 1983 retaliation claim when their employers acted on a mistaken perception. The Sixth Circuit's approach sensibly allows all employees who are harmed by employment decisions made for impermissible reasons to bring a § 1983 claim against the employers who acted unconstitutionally. The Third Circuit's rule arbitrarily shields wrongdoers from liability and leaves victims without a remedy. This ultimately undermines the First Amendment rights of millions of Americans, chills protected activity and encourages conformity.

---

whether the plaintiff produced enough evidence of actual affiliation or association.

## CONCLUSION

For the foregoing reasons *Amici* respectfully ask the Court to reverse the judgment of the Third Circuit and remand the case for trial.

Respectfully submitted,

/s/ J. Joshua Wheeler


CLAY CALVERT
Marion B. Brechner
First Amendment Project
2060 Weimer Hall
Gainesville, FL 32611

ROBERT D. RICHARDS
Pennsylvania Center for
the First Amendment
308 James Building
University Park, PA 16802

J. JOSHUA WHEELER
*Counsel of Record*
CLAYTON N. HANSEN
Thomas Jefferson Center
for the Protection of
Free Expression
400 Worrell Drive
Charlottesville, VA 22911
(434) 295–4784
jjw@tjcenter.org